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Majid Mohammadpour Mojtaba v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–275–09 OF 2014
MOHTARUDIN BAKI, ZAKARIA SAM JJCA AND ABDUL KARIM J
6 MARCH 2017

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Drug trafficking charge — Whether accused failed to show trial judge seriously misdirected himself or that his decision was unreasonable in circumstances of case — Whether appellate court would not disturb findings of facts made by trial judge — Whether prosecution proved its case against accused beyond reasonable doubt — Whether accused failed to raise reasonable doubt on prosecution's case

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The appellant, an Iranian, was convicted and sentenced to death by the High Court on a charge of trafficking in 123.6g of methamphetamine. The prosecution's evidence revealed that a police party, acting on information received, was in ambush position at a condominium when they noticed the appellant, who had a bag slung over his shoulders, and another person ('DW2') walking towards a parked car in the premises. When they noticed the appellant using the remote control to open the driver's door, the police party rushed in to apprehend the duo. They managed to arrest DW2 but the appellant got into the car, started the engine and sped off. The police gave chase. During the pursuit, one of the police officers, PW5, saw an item being thrown out of the car. While the other officers continued their chase, PW5 stopped to retrieve the item and found it to be a white plastic bag containing a crystalline substance. This was subsequently found to be 123.6g of methamphetamine. The appellant, who was later arrested, denied that the plastic bag belonged to him. In his defence, the appellant said that when he drove to the condominium there were three others in the car, namely, DW2, Ali and Hussin and that when he, DW2 and Ali went up to Ali's unit, Hussin remained in the car which was then unlocked with the engine and air-conditioner running. The appellant said when he and DW2 were later walking back to the car they saw several men rushing towards them. Thinking they were robbers, the appellant said he rushed to his car and sped off. Hussin, who was then lying in the backseat, got up with a start and when told what was happening, Hussin wound down the window and threw out a plastic bag which the appellant had earlier seen him carrying. The appellant said he was arrested when he stopped at a petrol station. The trial judge found that the appellant was not a credible witness; that the defence was a mere denial and afterthought and failed to raise a reasonable doubt on the prosecution's case. The judge also ruled that the appellant had mens rea possession of the drug and had failed to rebut the presumption of

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trafficking under s 37(da) of the Dangerous Drugs Act 1952. In the instant appeal against conviction and sentence, the appellant, inter alia, attacked the credibility of some of the police witnesses, especially PW5, who could not identify the person who threw the plastic bag out of the car. There was also no evidence to suggest PW5 had checked the car at close quarters earlier to ensure no one was in it. The appellant also argued that the trial judge should not have given any weight to the information the police had allegedly received which caused the ambush at the condominium to have taken place because that information was hearsay evidence as the person ('ASP Rajan') who had allegedly given it to PW5 was never called to testify. It was also submitted that adverse inference should have been invoked against the prosecution on its failure to call Ali or DW2 to testify.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) Based on the evidence, this court found that PW5 and PW6 were credible witnesses who were consistent in their evidence. Having regard to all the facts and circumstances, there was more than sufficient evidence to indicate the appellant was alone in the car (see para 31).

(2) The issue of Hussin was a red herring and, in the circumstances, unreal. PW5 categorically testified that he saw no one in the car and that when he saw the appellant and DW2 walking towards the car, it was locked and the engine was not running. It was opened by the appellant using a remote control device. On seeing PW5 and his team approaching, the appellant jumped into his car, started the engine and sped off. In such circumstances, it would be beyond comprehension to accept the appellant's suggestion that Hussin was in the car at the time with the engine and air-conditioner running. Equally non-sensible was the appellant's contention that it was Hussin who threw the plastic bag out of the window. Why should Hussin throw away his valuable goods just because some individuals wanted to attack the appellant? The trial judge was justified in finding that PW5 and PW6, who had both consistently denied the existence of Hussin throughout the trial, were credible witnesses and that Hussin was a non-existent figure (see para 32).

(3) The appellant's explanation that he ran from PW5 and his team because he was frightened and thought they were robbers or gangsters was clearly fanciful given that the incident took place in a guarded condominium; that the appellant had left his friend DW2 behind; that he had rammed through the barrier post at the guard house; the non-existence of Hussin and PW6's discovery of the appellant's open sling bag. The only irresistible conclusion from the appellant's conduct of throwing away the bag containing the methamphetamine was that he knew of the presence of the drug in the bag at the material time (see para 33).

(4) The trial judge did not admit and rely on the information PW5 had received in the case from ASP Rajan to arrive at his findings. The said information was disclosed as part of the of the police investigation and nothing more. It was introduced for a non-hearsay purpose ie not for the purpose of establishing the truth of the matter asserted. The trial judge did not anywhere in his grounds of judgment mention about the reception or admission of that impugned information, or even if it was mentioned, that he was relying upon it as his evidentiary basis in coming to his primary findings of facts as to the elements of the charge. There was nothing in the judgment to infer that he must have been swayed or influenced by such evidence. The trial judge had evaluated the case objectively and had rightly relied upon admissible evidence to arrive at his findings (see para 40).

(5) There was no necessity for the invocation of adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution over its non-calling of Ali, DW2 or ASP Rajan. It was clear from the facts that Ali or DW2 were not in the car when the plastic bag was thrown out of it. Hence, their evidence would have carried little weight and their non-calling did not create any gap in the prosecution's case. Furthermore, the defence had already called DW2 to testify. The appellant was also not prejudiced by the non-calling of ASP Rajan because the information he gave was for a non-hearsay purpose (see paras 41–42).

(6) An appellate court should not disturb the findings of facts made by the trial judge unless it was shown that the judge had seriously misdirected himself or that his decision was not reasonable in the circumstances of the case. As such challenges were not successfully raised in this case, this court agreed with the findings made by the trial judge (see para 47).

[Bahasa Malaysia summary

Perayu, seorang warganegara Iran, dibebaskan dan dilepaskan daripada hukuman gantung sampai mati oleh Mahkamah Tinggi bagi pertuduhan mengedar 123.6g methamphetamine. Keterangan pendakwaan mendedahkan bahawa pihak polis, bertindak atas keterangan yang diterima, berada dalam kedudukan serang hendap di sebuah kondominium semasa mereka ternampak perayu, yang menggalas beg pada bahunya, dan seorang lagi ('DW2') berjalan ke arah kereta yang diletakkan di premis. Apabila mereka nampak perayu menggunakan alat kawalan jauh untuk membuka pintu pemandy, pihak polis bergegas menangkap kedua-duanya. Mereka berjaya menangkap DW2 tetapi perayu berjaya memasuki kereta, menghidupkan enjin dan meluru pergi. Pihak polis mengejarnya. Semasa percubaan tersebut, salah seorang pegawai polis, PW5, ternampak satu barang dibuang keluar dari kereta. Semasa pegawai-pegawai lain mengejarnya, PW5 berhenti untuk mengutip barang tersebut dan mendapatinya sebagai sebuah beg plastik putih berisi bahan kristal. Ini kemudiannya disahkan sebagai 123.6g methamphetamine. Perayu,

yang kemudiannya ditahan, menafikan bahawa beg plastik tersebut miliknya. Dalam pembelaannya, perayu berkata bahawa semasa dia memandu ke kondominium, terdapat tiga orang dalam kereta tersebut iaitu DW2, Ali dan Hussin dan bahawa semasa dia, DW2 dan Ali pergi ke unit Ali, Hussin duduk di dalam kereta yang ketika itu tidak berkunci dan pendingin hawa dan enjin hidup. Perayu menyatakan bahawa semasa dia dan DW2 berjalan semula ke kereta, mereka nampak beberapa orang lelaki meluru ke arahnya. Memikirkan mereka adalah pencuri, perayu bergegas ke keretanya dan memecut pergi. Hussin, yang sedang baring di tempat duduk belakang, bingkas bangun dan setelah diberitahu apa yang terjadi, Hussin menurunkan tingkapnya dan membuang beg plastik yang perayu lihat dibawa olehnya. Perayu menyatakan bahawa dia ditangkap semasa dia di stesen petrol. Hakim bicara mendapati perayu bukan saksi yang boleh dipercayai; bahawa pembelaan adalah penafian semata-mata dan satu fikiran semula dan gagal membangkitkan keraguan munasabah terhadap kes pihak pendakwaan. Hakim juga memutuskan bahawa perayu mempunyai mens rea milikan dan gagal menyangkal anggapan pengedaran bawah s 37(da) Akta Dadah Berbahaya 1952. Dalam rayuan terhadap sabitan dan hukuman ini, perayu, antara lain, mencabar kebolehpercayaan sesetengah saksi polis, khususnya PW5, yang tidak dapat mengenal pasti orang yang membuang beg plastik tersebut keluar dari kereta. Tiada juga keterangan yang mencadangkan bahawa PW5 telah memeriksa kereta tersebut pada awalnya untuk memeriksa tiada siapa ada di dalamnya. Perayu juga menghujahkan bahawa hakim bicara tidak sepatutnya memberi apa-apa pemberatan pada maklumat yang dikatakan diterima oleh polis yang membawa pada serang hendap di kondominium yang berlaku kerana maklumat tersebut adalah keterangan dengar-cakap memandangkan orang yang memberinya kepada PW5 ('ASP Rajan') tidak dipanggil untuk memberi keterangan. Dihujahkan lagi bahawa anggapan bertentangan sepatutnya dibangkitkan terhadap pihak pendakwaan atas kegagalan mereka memanggil Ali atau DW2 untuk memberi keterangan.

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Berdasarkan keterangan, mahkamah mendapati PW5 dan PW6 adalah saksi yang boleh dipercayai yang konsisten dalam keterangan mereka. Merujuk pada kesemua fakta dan hal keadaan, terdapat lebih daripada cukup keterangan yang menunjukkan perayu seorang diri di dalam kereta (lihat perenggan 31).

(2) Isu Hussin adalah pengalih perhatian dan, dalam hal keadaan ini, tidak betul. PW5 secara kategorinya memberi keterangan bahawa dia tidak melihat siapa-siapa pun dalam kereta dan semasa dia melihat perayu dan DW2 berjalan ke arah kereta, kereta tersebut terkunci dan enjin tidak hidup. Kereta dibuka oleh perayu menggunakan alat kawalan jauh. Apabila melihat PW5 dan pasukannya hampir, perayu melompat masuk keretanya, menghidupkan enjin dan memecut pergi. Dalam hal keadaan

ini, sukar untuk menerima cadangan perayu bahawa Hussin berada di dalam kereta semasa enjin dan pendingin hawa hidup. Ini sama tidak munasabah dengan hujahan perayu bahawa Hussin yang membuang beg plastik ke luar tingkap. Mengapa Hussin perlu membuang barangnya yang bernilai hanya kerana beberapa individu yang ingin menyerang perayu? Hakim bicara bertindak wajar dalam memutuskan bahawa PW5 dan PW6, yang secara konsisten menafikan kewujudan Hussin sepanjang perbicaraan, adalah saksi yang boleh dipercayai dan bahawa Hussin tidak wujud (lihat perenggan 32).

(3) Penjelasan perayu bahawa mereka lari daripada PW5 dan bahawa pasukannya takut dan memikirkan bahawa dia adalah pencuri atau gengster jelas keterlaluan kerana insiden tersebut berlaku di dalam kondominium yang berpengawal; bahawa perayu meninggalkan rakannya DW2; dan bahawa mereka melanggar palang rumah pengawal; ketidakwujudan Hussin dan penemun beg galas perayu yang terbuka. Satu-satunya kesimpulan yang boleh dibuat berdasarkan tindakan perayu membuang beg berisi methamphetamine adalah bahawa dia tahu kewujudan dadah dalam beg tersebut pada masa material (lihat perenggan 33).

(4) Hakim bicara tidak menerima dan bergantung pada maklumat yang PW5 terima dalam kes yang terima daripada ASP Rajan untuk membuat kesimpulannya. Maklumat tersebut didedahkan sebagai pembuka naratif siasatan polis dan tidak lebih. Ini diperkenalkan bagi tujuan bukan dengar-cakap iaitu bagi tujuan membuktikan kebenaran hal perkara yang ditegaskan. Hakim bicara tidak, dalam mana-mana penghakimannya menyatakan bahawa penerimaan maklumat tersebut, atau jika pun dinyatakan, bahawa dia bergantung pada asas keterangan dalam membuat dapatan dapatan fakta utama tentang elemen-elemen pertuduhan. Tiada apa-apa dalam penghakiman yang menggambarkan bahawa dia terpengaruh oleh keterangan sedemikian. Hakim bicara menilai kes secara objektif dan dengan betul bergantung pada keterangan untuk membuat dapatan beliau (lihat perenggan 40).

(5) Tiada keperluan untuk membangkitkan anggapan bertentangan bahawa s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan atas kegagalan memanggil Ali, DW2 atau ASP Rajan. Jelas berdasarkan fakta bahawa Ali atau DW2 tidak berada di dalam kereta semasa beg plastik tersebut dibuang keluar daripadanya. Oleh itu, keterangan mereka kurang beratnya dan kegagalan memanggil mereka tidak menimbulkan apa-apa kelompongan terhadap kes pihak pendakwaan. Tambahan lagi, pihak pembelaan telah pun memanggil DW untuk memberi keterangan. Pihak perayu tidak terprejudis dengan kegagalan memanggil ASP Rajan kerana maklumat yang diberi olehnya adalah bagi tujuan bukan dengar-cakap (lihat perenggan 41–42).

(6) Satu-satu mahkamah tidak wajar campur tangan dapatan fakta yang dibuat oleh hakim bicara melainkan ditunjukkan bahawa hakim tersebut tersalah arah diri beliau atau bahawa keputusan yang beliau buat tidak munasabah berdasarkan hal keadaan kes. Oleh kerana cabaran sedemikian tidak dibangkitkan dalam kes ini, mahkamah bersetuju dengan dapatan oleh hakim bicara (lihat perenggan 47).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Abd Latif Sakimin v PP [2009] MLJU 1828, FC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Chan King Yu v PP [2009] 1 MLJ 457; [2009] 1 CLJ 601, FC (distd)
Leong Hong Khie v PP Tan Gong Wai v PP [1986] 2 MLJ 206; [1984] 1 LNS 172, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (folld)
PP v Loh Kah Loon [2008] 6 MLJ 552, CA (folld)
PP v Reza Mohd Shah Ahmad Shah [2009] 2 MLJ 490; [2010] 1 CLJ 541, FC (folld)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (folld)
Subramaniam v PP [1956] 1 MLJ 220; [1956] 1 LNS 115, PC (refd)
Yusri bin Mat Daud lwn Pendakwa Raya [2012] 2 MLJ 59; [2011] 1 LNS 1023, CA (folld)

Legislation referred to

Dangerous Drugs Act 1952 s 37(da)
Evidence Act 1950 s 114(g)

Appeal from: Criminal No 45(A)-49–07 of 2013 (High Court, Kuala Lumpur)

Muhammad Shafee bin Muhamad Abdullah (Scivetti & Assoc) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Karim J:

INTRODUCTION

[1] The appellant, Majid Mohammadpour Mojtaba, an Iranian, was charged for trafficking in dangerous drugs, an offence under the Dangerous

Drugs Act 1952. The amended charge reads:

> Bahawa kamu pada 31/03/13 jam lebih kurang 05.48 petang bertempat di tepi jalan selepas Lobi Kondominum Blok A2, Sri Putramas Condo, Jalan Kuching dalam Daerah Sentul di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan telah didapati mengedar Dadah Berbahaya iaitu 123.6 Gram Methamphetamine. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] At the end of the trial, the appellant was convicted and sentenced to death. Aggrieved by the decision, he appealed to this court. We heard the appeal and for the reasons that follow, had unanimously dismissed it.

THE PROSECUTION'S CASE

[3] Acting on information received, on 31 March 2013 at about 9am, ASP Mohd Najib Abdul Rahman, ('PW5'), organised a drug trafficking operation. He assembled 15 police personnel (two of whom were officers) and conducted a briefing on the said operation. PW5 then divided his team into six groups and instructed them to be on standby.

[4] At about 5.30pm on 31 March 2013, PW5 and his team went to Seri Putramas Condominium, Jalan Kuching, Kuala Lumpur ('the condo'). Immediately upon arrival, PW5 duly stationed his team at various places. Group 3, headed by Sub Inspector Mohd Dalila bin Mansor, ('PW6') was directed to be on guard at the front entrance of the condo near the guard post (*pos pengawal*). PW5 then saw a black Toyota Altis ('Toyota Altis') bearing registration No WQQ 5232 parked at parking lot No 80 at level 3C of the said premise. PW5, together with group 1 and 2, thereafter parked their cars immediately in front of the parked Toyota Altis. In his initial observation, PW5 did not see anybody in the car. They then waited and continued their observation from inside their respective cars.

[5] At about 5.48pm, the appellant and his friend, Mahmud, ('DW2'), came out from Block A2 lobby and walked towards the Toyota Altis. The appellant was wearing a dark t-shirt and a dark track suit. The appellant was also seen having a sling bag slung over his shoulders. Using a remote control, the appellant opened the driver's door while DW2 walked in front of the car to the passenger's side. PW5 then instructed his men to arrest the appellant and DW2. The police managed to arrest DW2. Nevertheless, while PW5 and other members of his team were running towards the appellant, the appellant, however, managed to get into the car, started the engine and sped off.

[6] PW5 immediately got into his car and pursued the Toyota Altis. Group

4 and 6 (on motorcycles) also followed PW5 in the pursuit. At the same time PW5 called on PW6 about the chase and directed PW6 to apprehend the appellant in the Toyota Altis. As the Toyota Altis driven by the appellant was exiting the condo vicinity and as it was approaching Block A2, PW5 saw the appellant throwing out an item from the car through the driver's window and the item landed by the roadside near a lamp post. PW5 did not see anybody else in the car.

[7] PW5 then halted his car to retrieve the said item, while his men continued to pursue the Toyota Altis. PW5 later discovered that the item was a white plastic bag ('exh P7') containing a transparent plastic packet marked 'Diamond' containing crystalline substance suspected to be Syabu ('exh P8').

[8] In running away from the hot pursuit, the appellant broke through the barrier post of the guard house. PW5's team, however, continued with the chase. At about 6.25pm, PW5 received a call from PW6 informing him that the appellant was apprehended. At about 6.40pm, PW6 brought the appellant to the condo. PW6 confirmed that no one else was seen and arrested with the appellant. PW5 thereafter showed the plastic bag (exhs P7 with P8 inside) that he retrieved from the roadside in front of Block A2 to the appellant. The appellant, however, denied the plastic bag belonged to him.

[9] PW5 later handed over the drug exhibit (exhs P7 with P8) to the investigating officer, PW7. The content of the plastic bag was sent to PW2, the chemist for analysis and it was found to contain 123.6g of methamphetamine, a dangerous drugs under the Act.

FINDINGS OF THE TRIAL JUDGE AT THE END OF PROSECUTION'S CASE

[10] At the end of the prosecution's case, the trial judge found that the prosecution had successfully established a prima facie case of mens rea possession of 123.6g of methamphetamine and trafficking of the same against the appellant as per the charge. At para H of his grounds of judgment, viz at pp 180–181, Vol 1 of the appeal record, (AR: V1) the learned trial judge made the following findings:

H. Dapatan Mahkamah Di Akhir Kes Pendakwaan

Mengenai isu pertama SP2 membuat analisis ke atas barang kes dan mengesahkan ketulan Kristal dalam plastic tersebut adalah methamphetamine seberat 123.6 gram. SP2 mengesahkan methamphetamine adalah dadah berbahaya seperti yang tersenarai dalam Jadual 1 Akta Dadah Berbahaya 1952.

Mengenai isu kedua, SP5 mengesahkan bahawa Tertuduhlah yang mencampakkan bungkusan plastik yang mengandungi dadah berbahaya itu dari kereta terbabit. Tiada orang lain dalam kereta itu ketika itu. Dari segi 'conduct' dan kawalannya ke atas kereta itu ketika itu menunjukkan dia ada milikan, kawalan, jagaan dan pengetahuan dadah berbahaya tersebut. Mahkamah berpuashati bahawa Tertuduh mempunyai milikan terhadap dadah tersebut seperti yang diputuskan oleh Mahkamah Persekutuan *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113. Rujuk juga keputusan kes Mahkamah Persekutuan, *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337 dan *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717. Pada pendapat Mahkamah Tertuduh mempunyai pengetahuan mengenai dadah berbahaya tersebut.

Mengenai isu ketiga, ekoran dari dapatan Mahkamah bahawa Tertuduh memiliki dan mempunyai pengetahuan mengenai dadah berbahaya tersebut, maka anggapan di bawah s 37(da) Akta Dadah Berbahaya adalah terpakai. Tertuduh dianggap mengedar dadah berbahaya tersebut.

Mengenai isu keempat, mahkamah berpuashati rantaian keterangan pendakwaan teratur dan tidak terputus. (*Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75, *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289).

Mengenai Ali dan Mahmud, Mahkamah berpendapat bahawa dari fakta kes yang dikemukakan, mereka tidak terlibat dalam kes ini secara khusus. Dadah berbahaya yang dikemukakan adalah dadah berbahaya yang dicampakkan keluar oleh Tertuduh dari kereta yang dipecutnya semasa melarikan diri.

Walaupun ada sidang akhbar, tidak dibuktikan barang kes ada dikemukakan dalam sidang akhbar tersebut.

Oleh itu Mahkamah memutuskan bahawa pendakwaan berjaya membuktikan satu kes prima facie terhadap Tertuduh atas pertuduhan yang dikenakan.

[11] Based on the above findings, the learned trial judge ordered the appellant to enter his defence.

THE DEFENCE CASE

[12] The appellant elected to give evidence on oath and called DW2, Mahmud Shahriarifar, an Iranian, to support his evidence. According to the appellant, on 31 March 2013, he went to Shisha Lounge, an Iranian restaurant at Solaris Mont Kiara, together with DW2. They went there in the Toyota Altis belonging to the appellant's uncle, one Ali Javan.

[13] At the restaurant, the appellant met his friend Ali and Ali's friend by the name of Hussin (or Hossein). During this encounter at the restaurant, Ali found out that the appellant was an athlete. Ali then requested the appellant to teach him as to how to operate a gym equipment which Ali had bought. The

gym equipment was in Ali's house in Seri Putramas.

[14] The appellant then agreed to help and drove all four of them to Ali's condominium. Upon reaching the condominium, Hussin informed the appellant that he wanted to wait in the car until the appellant finishes his work in Ali's condo. The appellant obliged and left the car's engine running with the air conditioner on. The appellant did not lock the car before he went up to Ali's condo together with Ali and DW2.

[15] According to the appellant, as he and DW2 were approaching the car after they got out of the lift, a few individuals approached and attacked them. Thinking that they were robbers, the appellant immediately jumped into the car and sped off.

[16] As he was driving the car, Hussin, who was then lying at the backseat, immediately jumped up and asked what was happening. The appellant informed him that some unknown persons had charged towards him and wanted to attack him. Upon hearing this, Hussin wound down the window and threw a white plastic bag out of the car. According to the appellant, he noticed Hussin was carrying the plastic bag from the restaurant in Solaris Mont Kiara.

[17] The appellant drove towards Mont Kiara and finally reached Jalan Ipoh. According to the appellant he was looking for a police station and finally stopped at the petrol station and got out of the car. The appellant then decided to take a taxi to get to the police station. Just as he was about to board the taxi, he was arrested.

FINDINGS OF THE TRIAL JUDGE AT THE END OF TRIAL

[18] At the end of the trial, the learned judge found that the appellant's defence was an afterthought, a mere denial and that it did not raise a reasonable doubt on the prosecution's case. The appellant failed to rebut the presumption under s 37(da) of the Dangerous Drugs Act 1952. The trial judge also stated that after evaluating the appellant's demeanour during the trial, he came to a finding that the appellant was not a credible witness. The trial judge further found that the appellant had knowledge of the drugs and that the large amount of the drugs recovered led to the inference that the drugs was certainly not for personal consumption but for trafficking purposes. The appellant was thus convicted and sentenced to death, hence this appeal.

THE APPEAL

[19] Before us, and although the petition of appeal contains several grounds of appeal, learned counsel for the appellant canvassed strongly on the following issues:

(a) witnesses for the prosecution are not credible;

(b) the non-calling of material witnesses and the admission of hearsay evidence;

(c) the non-appreciation of the defence case; and

(d) break in the chain of evidence.

On these four main grounds, learned counsel submitted that the conviction was not safe.

First issue: Witnesses for the prosecution are not credible

[20] The appellant submitted that PW5 and PW7 were not credible witnesses. It was said that they had not been forthright in their testimonies and had contradicted themselves on many material points throughout the trial. It was submitted that PW5 was inconsistent in his statement as to the appellant's alleged act of throwing the said plastic bag (exh P7) from the driver's window of the car. This complaint was from the following PW5's evidence:

Examination-in-Chief of PW5

Q: Selepas itu?

A: Kereta itu keluar dari bangunan parking menghala ke pintu keluar kondo. Bila sampai di kawasan depan Blok A2, *saya nampak Majid mencampakkan sesuatu keluar dari tingkap pemandu*. Barang yang di baling itu jatuh di tepi jalan berdekatan dengan 1 tiang lampu.

Cross-Examination of PW5

Q: Kamu ikut belakang, slow hingga 15 meter, saya cadangkan jika kamu di belakang slow hingga 15 meter tidak boleh nampak ia dicampak dari tingkap mana kereta?

A: *Setuju. Saya hanya boleh nampak barang keluar.*

Q: Saya katakan — *kamu tidak boleh nampak siapa yang campakkan. Kamu nampak barang dicampakkan?*

A: *Setuju.*

Referring to the above PW5's evidence, it was contended that PW5 himself was

not a credible witness and was himself unsure as to the identity of the individual who allegedly threw out the plastic bag from the car.

[21] The appellant also questioned the truthfulness of PW5's testimony as to the observation he made on the car prior to the ambush. It was emphasised that nowhere was it explained by PW5 as to how he observed the car when it was parked. There was no evidence to suggest that PW5 did in fact peered through the windows of the car to make sure that no one was inside the car. The only available evidence was PW5's observation of the car's plate number from about a metre away.

[22] On PW7, it was submitted that she also demonstrated to be an unconvincing witness in her testimony relating to the press conference. PW7 also did not produce the entire CCTV recordings and merely selected certain portions of the recordings to be analysed. She did not give a satisfactory explanation as to why she did not produce the entire CCTV recordings.

[23] The respondent on the other hand contended that PW5 and PW6 were very firm in their evidence that there was no one in the car except the appellant. Further, it was submitted that from the facts established, the appellant's conduct of throwing away the plastic bag containing the drug methamphetamine with the gross weight of close to 0.5kg, the only conclusion that this court could have arrived at is that the appellant knew of the presence of the drugs in the plastic bag. More importantly, the learned trial judge had found that the prosecution witnesses were credible and reliable and the act of the accused had clearly shown that he had knowledge and possession of the said drugs.

Second issue: Non-calling of material witnesses and hearsay evidence

[24] The appellant submitted that the case for prosecution was based on information allegedly received by the police on the involvement of three Iranian males in a drug trafficking activity and also on the description of the vehicle used. However, the said information remains hearsay evidence as the officer who allegedly received such information was never called to testify in court. In addition, it was further submitted that the prosecution's failure to call Ali or Mahmud or at least to offer them to the defence had warranted the invocation of an adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution.

Third issue: Non-appreciation of the defence case

[25] Learned counsel submitted that the learned trial judge had failed to judicially appreciate the evidence adduced by the defence both during the

prosecution's stage as well as during the defence stage. Learned counsel further submitted that the learned trial judge had also failed to consider and make a finding on the issues raised by the defence.

[26] The respondent on the other hand submitted that the learned trial judge had heard and appreciated the appellant's evidence. The learned judge was of the view that the appellant did not rebut the presumption of trafficking and had failed to raise any reasonable doubt on the prosecution case.

OUR FINDINGS

[27] Having perused the grounds of judgment of the trial judge, we were satisfied that the learned trial judge had taken into account all the relevant considerations in coming to his decision. It is consciously noted that the learned trial judge had the benefit of seeing the demeanour of witnesses, had considered all the evidence in it totality and had come to a conclusion that the appellant was guilty as charged.

[28] Firstly, we shall now deal with the first issue on the unreliability of the prosecution's witnesses. As earlier alluded, learned counsel argued that there was inconsistency in the PW5's evidence regarding the observation made on the car when it was parked and that there was no evidence to confirm that PW5 had ensured there was no one else inside the Toyota Altis. Hence, PW5 himself was said to be unsure about the identity of the individual who allegedly threw out the plastic bag from the car.

[29] We found no merits in the argument by learned counsel. Based on the evidence adduced, as per notes of proceedings, the prosecution's witnesses had at all material time given their evidence consistently throughout the whole trial that the appellant was the person having the custody and control of the car and that no one else was in the car except himself during the incident in question.

At p 52 of AR: V1, PW5 in his examination-in-chief testified as follows:

Q:	Ada orang lain dalam kenderaan semasa pemerhatian yang kamu lakukan ke atas kenderaan itu?
J:	Tiada.
Q:	Bagaimana pintu itu dibuka oleh suspek?
J:	Guna alat penggera.
Q:	Siapa pegang alat penggera itu?
J:	Majid.

At p 61 of AR: V1, SP5 further testified:

Q: Semasa kamu kejar kenderaan yang dipandu OKT ada orang lain dalam kenderaan OKT?

J: Tiada.

When asked about another person in the car during cross-examination, PW5 responded with the following backdrop (at p 63, AR: V1):

Q: Kamu nampak kereta di kondo Hartamas tingkat 3C kali pertama?

A: Ya.

Q: Pada masa itu kereta parking?

A: Parking.

Q: Berapa jauh kamu tengok kereta mula-mula tengok?

A: Bila nampak kereta berdasarkan nombor dan jenis kereta, saya hubungi pasukan serbuan berkumpul di situ. Saya mengarahkan pasukan serbuan untuk pemerhatian. Saya parking di lobi no. 106 selepas nampak kereta itu.

Q: Dari no. 106 kamu panggil pasukan?

A: Ya.

Q: Kamu beri taklimat di mana?

A: Depan kereta saya.

Q: Tempat pemerhatian?

A: Pasukan 2 di parking no. 105. Yang lain kiri dan kanan. Yang kanan lebih kurang 30 meter dari saya. Yang sebelah kiri lebih kurang 15 meter dari saya di parking motorsikal tingkat yang sama di sebelah kiri.

Q: Jarak parking lot 106 dengan lot 80 berapa?

A: Lebih kurang 10 meter.

Q: Kamu tidak pergi ke tempat parking lot 80 dan kamu perhatikan?

A: Saya pergi sebelum saya atau pasukan saya turun dari kereta dan sahkan kereta yang terlibat daripada nombor dan jenis.

Q: Berapa jarak kamu dengan no. plat kereta tersebut?

A: Lebih kurang 1 meter dekat.

Further, at p 63, AR: V1, the following was suggested to PW5:

Q: Saya katakan – bila Tertuduh masuk ke dalam keretanya ada seorang lagi dalam kereta itu iaitu Hoesin?

A: Tidak setuju. **A**

At p 69: AR: V1, it was further suggested to PW5 as follows:

Q: Kamu ikut di belakang, slow hingga 15 meter. Saya cadangkan jika kamu di belakang slow hingga 15 meter tidak boleh nampak ia dicampak dari tingkap mana kereta? **B**

A: Setuju. Saya hanya boleh nampak barang keluar.

Q: Saya katakan- bila kereta dipandu oleh OKT keluar dari kondo ada 2 orang iaitu Tertuduh dan Hoesin? **C**

A: Tidak setuju.

Focusing on this issue as raised in the cross-examination, PW5 made the following clarification during his re-examination: **D**

At p 73 of AR: V1:

Q: Kamu nampak apa ada dalam kereta?

J: Tiada orang dalam kenderaan' **E**

At p 74–76, AR: V1:

Q: Rakan saya cadangkan – dalam jarak 10–15 meter kamu tidak nampak barang dibuang dari tingkap mana kereta. Barang kes dibuang dari sebelah mana? **F**

J: Bermula dari pemerhatian sebelum kedua-dua orang menghala ke kereta, saya pasti tiada orang dalam kereta. Saya pasti hanya tertuduh masuk ke dalam kereta itu. Tertuduh bawa kereta itu. Hanya tertuduh sahaja ada dalam kereta sebelum barang dibuang. Saya yakin tertuduh yang buangkan bungkusan itu. Dia buang dari arah tingkap pemandu iaitu di bahagian sebelah kanan kereta.. **G**

Q: Ada Mahmud, tertuduh atau Ali beritahu mengenai Hoesin?

J: Tidak. **H**

[30] PW5's evidence was further supported by the evidence of PW6. PW6 in his evidence testified that he saw the Toyota Altis rammed the guard barrier post at the guard house. At p 81, AR: V1, he further said: **I**

Q: Berapa jarak kenderaan kamu dengan kenderaan hitam semasa kamu ekori?

A: Jarak 2 buah kenderaan.

Q: Seterusnya?

A: Saya lihat kereta hitam ini berhenti di tempat letak kereta di depan tanah perkuburan Islam Batu 3 Jalan Ipoh. Seorang lelaki lari lintas jalan masuk ke tanah perkuburan. Lelaki itu keluar dari kenderaan warna hitam tersebut WQQ 5232.

Q: Ada orang lain bersamanya pada masa itu?

A: Tiada.

PW6 also testified that the appellant's sling bag zipper was open (*zip terbuka*). On examination, PW6 found that the sling bag contained some of the appellant's personal items and a car key. The appellant later showed PW6 the Toyota Altis which he drove. PW6, using the said car key, opened the Toyota Altis. PW6, however, confirmed that before he opened the Toyota Altis, the car was locked. In cross-examination PW6 disagreed with learned counsel's suggestion that the appellant and one Hussin alighted from the car and ran to the cemetery. In his re-examination, he further confirmed that he only saw the appellant and nobody else alighting from the car and ran towards the cemetery.

[31] Based on the aforesaid evidence, which was not successfully challenged by the appellant, we found that PW5 and PW6 were credible witnesses and consistent in their evidence. We did not agree with learned counsel's argument that there was no evidence to show that PW5 was able to identify the person who threw the incriminating exhibit from the Toyota Altis. Having regard to all the facts and circumstances, there was more than sufficient evidence to indicate that the appellant was alone in the said car. Thus, the learned trial judge was duly justified when he made the following findings (at p 185, AR: V1):

> SP6 mengesahkan keterangan SP5. Dalam pemeriksaan utama mengatakan 'saya lihat kereta hitam ini berhenti di tempat letak kereta di depan tanah perkuburan Islam Batu 3, Jalan Ipoh. Seorang lelaki lari lintas jalan masuk ke tanah perkuburan. Lelaki ini keluar dari kenderaan warna hitam tersebut WQQ 5232. 'Q: Ada orang lain bersamanya pada masa itu? J: Tidak 'Dalam pemeriksaan balas beliau mengatakan 'S: Saya katakan tertuduh dan seorang lagi Hussin telah keluar dari kereta itu ke tempat letak kereta dekat stesen minyak Petronas dan lari ke tempat perkuburan? J: Tak Setuju'
>
> Tak dapat dinafikan dalam pemeriksaan balas, Tertuduh SD1 menafikan tiada orang dalam kereta yang dipandunya itu. Beliau menegaskan *Hussin* ada dalam kereta itu. Hussin yang mencampakkan dadah itu semasa dikejar polis.
>
> Daripada keterangan SP5 dan SP6 dibandingkan dengan keterangan SD1 (tertuduh) dan SD2, mahkamah berpendapat keterangan SP5 dan SP6 adalah lebih logic dan boleh diterima.

[32] We apprehend that the main plank of the appellant's defence was on Hussin, who, it was submitted, was the real trafficker and the real person who threw the plastic bag (P7 with P8) from the Toyota Altis during the hot pursuit.

Upon the stance taken by the trial judge, which we had earlier endorsed, we found that the issue of Hussin was a red herring and in the circumstances, unreal. In his evidence, PW5 categorically testified that he saw no one in the car and at the time he saw the appellant and DW2 walking towards the Toyota Altis, the car was locked and the engine was not running. It was then opened by the appellant using a remote control device. Upon seeing the approaching of PW5 and his team towards him, the appellant jumped into the car, started the engine and sped off. In such circumstances it would be beyond comprehension to accept learned counsel's suggestion that the person Hussin was in the car with the air condition switched-on and the engine was running. This non-comprehensible situation was further compounded by the appellant's explanation that Hussin threw away the plastic bag from the car window upon the appellant informing him that a few individuals wanted to attack him. This was non-sensible because why should Hussin throw away his valuable goods just because some individuals wanted to attack the appellant? In fact, and as found by the learned trial judge, the prosecution witnesses particularly PW5 and PW6 consistently denied the existence of Hussin throughout the trial. We found that the learned judge was justified in finding as he did that PW5 and PW6 were credible witnesses and that Hussin was a non-existent figure.

[33] Now, upon the collapse of the aforesaid main plank defence on the existence of Hussin, the issue of the appellant's conduct became critical to his defence. In his defence, he explained that he ran from PW5 and team because he was frightened and believed that they were robbers or gangsters *(penyangak)*. Having regard to all the facts and circumstances, more particularly the facts that the incident was in a guarded condo, the leaving behind of his friend DW2, the ramming of the barrier post, the non-existence of Hussin, and PW6's discovery of the appellant's open sling bag, we concluded that the appellant's explanation of his flight to be clearly fanciful. As earlier observed, PW5 and PW6 were very firm that there was no one else in the car except the appellant. We agreed with the learned DPP's submission that from the facts established, the appellant's conduct of throwing away the plastic bag ('exh P7') containing the drugs ('exh P8') methamphetamine with the gross weight of close to 0.5kg, the only irresistible conclusion was that the appellant knew of the presence of the drugs in the plastic bag P7 thrown by him while speeding off in his car at the material time. We are of the view that based on the primary facts found by the trial judge, and the application of the legal precepts as expounded in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19, *Public Prosecutor v Loh Kah Loon* [2008] 6 MLJ 552, and *Public Prosecutor v Reza Mohd Shah Ahmad Shah* [2009] 2 MLJ 490; [2010] 1 CLJ 541, the learned judge had rightly arrived at the following ultimate facts (p 185, AR: V1):

> Dari segi 'conduct' tertuduh mencampakkan dadah berbahaya itu keluar dari kenderaan WQQ 5232 menunjukkan tertuduh memiliki, mempunyai pengetahuan dan mengedarkan dadah berbahaya tersebut ...

[34] The second issue argued by learned counsel was on the non-calling of material witnesses and the reception of hearsay evidence. The appellant's counsel argued that the trial judge had erred in law and in fact when he admitted and relied on the information received by PW5 from one ASP Rajan from the *Unit Risikan.* It was strenuously argued that it was clearly inadmissible as being hearsay evidence. In this connection, learned counsel argued that it is a settled law that the choice of calling witnesses is in the hand of prosecution, however this discretion must be exercised judiciously and in the best interest of justice.

[35] We will deal with the issue of hearsay evidence first although it is inextricably linked to the issue of non-calling of witnesses by the prosecution. Relying on the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705, learned counsel submitted the learned judge had erred in law and in fact when *he admitted and relied on* the information received by PW5 from one ASP Rajan of Unit Risikan Zon 2 when such information was clearly inadmissible as being hearsay evidence. It was further submitted since ASP Rajan was not called as a prosecution's witness, the prosecution had adduced a highly prejudicial evidence pertaining to the description of the car through PW5 and PW6 as well as information pertaining to the three Iranian males.

[36] We had duly considered the learned counsel's submission and in doing so we had referred to two cases to resolve the issues raised. The first was the Federal Court case of *Chan King Yu v Public Prosecutor* [2009] 1 MLJ 457; [2009] 1 CLJ 601. On the issue of the admissibility of the information received by the police, His Lordship Zulkefli Makinudin FCJ, delivering one of the majority judgments, held as follows:

> *(1) The Police Were Acting On Information Received*
>
> [68] It was argued for the appellant that the learned trial judge and the Court of Appeal judges had misdirected themselves in admitting hearsay evidence and other inadmissible evidence which was highly prejudicial to the appellant. It was submitted that in respect of some of the admitted evidence there were elements of higher prejudice than probative value and the court ought to have exercised its discretion to exclude them. It was contended for the appellant that the prejudicial element is that the police were acting on information received by ASP Giam Kar Hoon (PW7) from an informant that on 19 June 2000 a Chinese male from Hong Kong by the name of Chan King Yu would be trafficking in a dangerous drug ('syabu') at Hotel Nova, Kuala Lumpur. Based on this information PW7 assembled his team to raid the said hotel room occupied by the appellant.
>
> [72] I am of the view from the above quoted findings in the judgment of the courts, it can be said that both the High Court and the Court of Appeal *had acted on statements which were clearly hearsay and prejudicial* to the appellant and therefore inadmissible. On this point I would like to refer to the case of *Alcontara a/l Ambross*

Anthony v Public Prosecutor [1996] 1 MLJ 209; [1996] 1 CLJ 705.

[37] Abdul Aziz Mohamad FCJ, however, in His Lordship's dissenting judgment held as follows:

> [38] In this case I have no doubt that the learned trial judge was not swayed by the information that the police received. From the judgment it is clear to me that his rejection of the defence was made upon an objective consideration of all the admissible evidence, from which he found that the appellant was in possession of the drugs. From what he said in the passage quoted it seems clear to me that he rejected the defence, which involved Man Chai, because, with the finding that the appellant was in possession of the drugs, it made no difference to his guilt if he was keeping the drugs for Man Chai who was said to be coming to the hotel to collect it. The learned judge's mention of the information received by the police and of the appellant being the target of the police and not Man Chai was as much as to say merely that the focus of the police operation and of the case was the appellant, whose guilt had to be established, and was established by proof of possession, and not Man Chai, whatever his concern with the drugs may have been.
>
> [39] The point therefore does not, in my judgment, avail the appellant.

[38] The second case referred was the Court of Appeal case of *Yusri bin Mat Daud lwn Pendakwa Raya* [2012] 2 MLJ 59; [2011] 1 LNS 1023, and upon the facts as stated in the judgment, YA Ahmad Maarop (as he then was), held as follows:

> [20] Satu lagi hujah yang ditimbulkan oleh peguam Yusri adalah berkaitan dengan maklumat yang diterima oleh SP5. Menurut peguam, SP5 telah memberikan keterangan berikut:
>
> > Pada 9 Mei 2002, lebih kurang 11.30 pagi, saya telah menerima satu maklumat daripada sumber mengenai satu kegiatan pengedaran dadah oleh seorang lelaki Melayu yang dikenali dengan nama Yus di kawasan Farmasi Caristra Medicare, Batu Jalan Cheras, Kajang dan pembelinya adalah seorang lelaki India dengan nama Sam yang akan berlaku pada jam 4 hingga 4.30 petang hari yang sama.
>
> Petikan tersebut adalah inti pati keterangan SP5 yang terdapat di ms 54, Jld 1, rekod rayuan. Peguam berhujah bahawa keterangan dalam petikan tersebut tidak boleh diterima masuk dalam keterangan kerana ia adalah berkaitan dengan identiti orang kena tuduh dan juga identiti pembeli dadah ('Sam'). Peguam berhujah bahawa keterangan tersebut adalah 'prejudicial' kepada Yusri dan sepatutnya telah tidak diterima masuk dalam keterangan oleh YA hakim bicara. Untuk menyokong hujahnya peguam telah merujuk kes *Chan King Yu v Public Prosecutor* [2009] 1 MLJ 457; [2009] 1 CLJ 601. Menurut peguam, dalam kes tersebut, Mahkamah Persekutuan telah merujuk kepada kes *Vijayaratnam v Public Prosecutor* [1962] 1 MLJ 106; [1961] 1 LNS 149 dan *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 dan memutuskan bahawa:

A The evidence adduced by the prosecution witnesses showed that the police team was in fact acting on information received to effect the arrest and detention of the appellant. From the findings in the judgment of both the High Court and the Court of Appeal it was seen that both courts had acted on evidence of information received which was clearly hearsay evidence and prejudicial to the B appellant and therefore inadmissible (see paras 75 and 76).

Kami tidak dapat menerima hujah peguam itu. Tidak seperti dalam kes *Chan King Yu v Public Prosecutor*, di dalam kes di hadapan kami dalam penangkapan Yusri pihak polis telah menggunakan seorang pegawai polis (SP7) yang bertindak sebagai penyamar sulit, yang dibenarkan oleh undang-undang (lihat s 40A(1) dan (2) ADB C serta kes-kes di mana penyamar sulit digunakan misalnya *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] 1 CLJ 540; [1987] CLJ Rep 241 dan *Nasaruddin bin Daud & Anor v Public Prosecutor and another appeal* [2010] 6 MLJ 35; [2010] 8 CLJ 21). Dalam keadaan yang sedemikian itu keterangan SP5 tentang maklumat yang diterimanya D telah diberikan dalam keterangan sebagai latar belakang kepada tindakan polis seterusnya dan untuk menjelaskan peranan SP7 dan memberikan erti kepada penyamarannya sebagai 'Sam'. Tanpa keterangan tentang maklumat itu, keterangan SP5 dan SP7 akan kelihatan tergantung yang mewujudkan gap dalam narrative pembentangan keterangan pihak pendakwaan. Tanpa keterangan tentang E maklumat tersebut, akan timbul soalan-soalan — kenapa polis bertindak pada tarikh dan waktu tersebut? Kenapa polis membuat serang hendap di Farmasi Caristra? Kenapa SP7 menggunakan nama samaran 'Sam', bukan 'Tom', 'Jerry' atau 'John'? Pada hemat kami, apa yang lebih penting ialah dalam penghakimannya YA hakim bicara telah tidak bergantung kepada keterangan tentang maklumat itu untuk mensabitkan Yusri. Malahan beliau peka bahawa butir-butir tentang F maklumat tersebut adalah hearsay sebagaimana yang diputuskan oleh Mahkamah Persekutuan dalam *Alcontara a/l Ambross Anthony v Public Prosecutor*. Seperti yang telah pun kami huraikan di bahagian lain dalam penghakiman ini, keputusan YA hakim bicara telah bergantung kepada keterangan SP7 dan SP5 tentang apa yang berlaku di tempat kejadian serta keterangan saksi-saksi pendakwaan yang lain. G Di peringkat rayuan kes ini di hadapan kami pun, kami tidak bergantung kepada keterangan maklumat tersebut untuk mempertimbangkan sama ada sabitan atas Yusri adalah selamat.

[21] Tambahan pula dalam pengamatan kami rayuan perayu dalam kes *Chan King Yu v Public Prosecutor* telah dibenarkan oleh penghakiman majoriti Mahkamah H Persekutuan bukan semata-mata atas alasan penerimaan masuk keterangan tentang maklumat yang telah mencetuskan tindakan polis. Terdapat alasan-alasan lain yang lebih penting seperti berikut kenapa sabitan perayu dalam kes itu tidak dapat dikekalkan:

I (a) kegagalan polis menyiasat peranan Man Chai yang didapati mahkamah memang wujud walaupun perayu telah menyebut nama Man Chai dalam pernyataan beramarannya. Perayu mendakwa ekshibit-ekshibit yang incriminating dalam kes itu dipunyai oleh Man Chai;

(b) Mahkamah Persekutuan mendapati bahawa ada justifikasi untuk

membuat kesimpulan bahawa pihak polis telah masuk ke bilik hotel yang dihuni oleh perayu terlebih dahulu tanpa kehadiran perayu sebelum masuk ke bilik tersebut kali kedua semasa perayu berada dalam bilik tersebut; dan

(c) kegagalan pihak pendakwa memanggil seorang saksi penting telah mencetuskan pemakaian *adverse inference* di bawah s 114(g) Akta Keterangan 1950.

[39] In considering this issue, we must not overlook the fact that in all those cases cited by learned counsel in support of the objection, the critical focus was on the reception or reliance of such evidence by the court to make certain findings of facts in establishing the elements of the charge. It cannot be gainsaid that if the purpose of adducing such evidence was to prove the truth of it, it would clearly become an inadmissible hearsay. This is consistent with the basic principle on the barring of hearsay evidence — see *Leong Hong Khie v Public Prosecutor Tan Gong Wai v Public Prosecutor* [1986] 2 MLJ 206; [1984] 1 LNS 172; and *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220; [1956] 1 LNS 115. This type of evidence, however, is admissible if such evidence was adduced not as a basis to establish a primary fact as alluded above, but rather merely as an information per se received by the police viz as an introductory narrative of police's action or investigation. In other words, it is introduced for a non-hearsay purpose, ie for the purpose other than to establish the truth of the matter asserted. It is in this perspective that the judgment of His Lordship Ahmad Maarop JCA (as he then was) in the *Yusri*'s case, and His Lordship Abdul Aziz Mohamad FCJ (dissenting) and Zulkefli Makinudin FCJ (majority) in *Chan King Yu*'s case, should be viewed.

[40] Now, in the present case the said information was disclosed as part of the introductory narrative of police investigation and nothing more. After reading the learned trial judge's ground of judgment, we cannot agree with learned counsel's submission that the learned judge did admit and rely on the information to arrive at his findings. It was to be noted that the learned judge did not anywhere mention about the reception or admission of that impugned information, or if mentioned, relying upon it as his evidentiary basis, as direct or circumstances evidence, in coming to his primary fact findings as to the elements of the charge. The learned trial judge must have been aware of the aforementioned cases. More so, we found that there was nothing in his judgment for us to infer that he must have been swayed or influenced by such evidence. In the present context, there is no issue of prejudice to the appellant. However, it would be a serious misdirection or flaw in the learned judge's judgment if he had relied upon such evidence, either directly or indirectly, as in the *Chan King Yu*'s case, which was clearly distinguishable with the present case before us. It is our considered view that the ratiocination in *Yusri*'s case on this issue was applicable and should be the correct stance to take. We also found

A that the learned judge had evaluated the case objectively and had rightly relied on admissible evidence to arrive at his findings. Even *aliunde,* there were overwhelming evidence to support his findings. Thus, we did not find any merit in the learned counsel's argument on this issue.

B **[41]** As we had earlier alluded, the issue of the non-calling of witnesses as highlighted by learned counsel was inextricably linked with the above hearsay issue. In addition, in view of the stance that we had taken on the issue of Hussin and the inadmissibility of the impugned information, we are of the view that the issue on the non-calling of Ali or Mahmud purportedly to unfold the
C existent of Hussin was a *non sequitur.* In any event, it is trite that the prosecution has a discretion as to which witnesses should be called (see *Abd Latif Sakimin v Public Prosecutor* [2009] MLJU 1828; and *Munusamy v Public Prosecutor* [1987] 1 MLJ 492). From the facts of the present case, it was clearly
D found that Ali or Mahmoud was not in the car when PW5 saw the appellant throwing the plastic bag. Therefore, their evidence would carry little weight and did not create any gap in the prosecution's case. Furthermore, the defence had already called Mahmoud as DW2. Hence, we saw no attraction in learned counsel's persuasion for us to invoke the provision of adverse inference under
E s 114(g) of the Evidence Act 1950.

[42] We were also of the view that the above proposition was applicable to the issue on the non-calling of ASP Rajan. In the circumstances adumbrated, the submission on the invocation of the provision of s 114(g) of the Evidence
F Act 1950 did not follow. Since we had found that the impugned information was adduced for a non-hearsay purpose, and following the approach taken in the *Yusri*'s case, there was no prejudice in the prosecution not calling ASP Rajan to the stand as a witness during the prosecution case. Hence, we found no merit in this issue as argued by learned counsel.

G

[43] On the issue of break in the chain of evidence, we agreed with the learned judge's finding that there was no proof that the press conference had in anyway affect the integrity of the drugs exhibits. We also found that PW5 and PW7 had identified the drugs exhibits based on the markings made by them
H respectively. PW2 too had identified the drugs exhibits based on the markings made by PW7. We therefore agreed with learned DPP's submission that on the authority of *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75, there was no break in the chain of evidence of the drugs exhibits in the present case.

I **[44]** The last issues raised was that the learned trial judge had failed in evaluating the defence's case. In evaluating the defence version put by the appellant, it was submitted that the learned trial judge had failed in appreciating the evidence put forward by the defence counsel during prosecution and defence case.

[45] It was further submitted that DW2 had corroborated and confirmed the appellant on all material points. He was also never seriously challenged by the prosecution. There was also no further evidence adduced by the prosecution to show that the appellant did in fact throw away the plastic bag from the car. There was also no evidence to negate the existence of Hussin, as the CCTV malfunctioned at the material time. Therefore, it was urged upon us that the uncertainty must and should be resolved in the appellant's favour.

[46] In view of our findings on the aforementioned issues, we were not impressed with the above submission. We found that the learned trial judge had discussed and evaluated reasonably the defence case in his grounds of judgment. It was his finding that the defence did not raise any reasonable doubt and the appellant fail to rebut the presumption of trafficking. We therefore agreed with his following grounds:

Dapatan mahkamah di akhir kes pembelaan

Mengenai isu pertama, kereta Toyota Altis WQQ 5232 dipandu oleh Tertuduh semasa dadah berbahaya dalam plastik itu dicampakkan keluar kereta tepi jalan selepas lobi Blok A Kondo Sri Putramas. SP5 dalam keterangan mengatakan 'kereta itu keluar dari bangunan parking menghala ke pintu keluar kondo. Bila keluar sampai di kawasan depan Blok A2, saya nampak Majid mencampakkan sesuatu keluar dari kenderaan dari tingkap pemandu. Barang yang dibaling itu jatuh di tepi jalan berdekatan satu tiang lampu'. 'Saya arahkan pemandu saya berhentikan kenderaan saya. Pasukan 2 dan pasukan bermotosikal saya arahkan kejar kereta yang dipandu Majid. Seterusnya saya ambil barang yang dibuang oleh Majid. Saya dapati ia satu bungkusan plastik warna putih yang di dalamnya terdapat 1 bungkusan plastik lutsinar bertulis 'Diamond'. Dalam plastik lutsinar itu terdapat serbuk dan ketulan kristal disyaki dadah syabu'. Menurut SP5 juga tiada orang dalam kereta semasa pemerhatian dibuat keadaan kereta itu berkunci. Dalam pemeriksaan balas SP5 mengatakan 'S: Saya katakan bila Tertuduh masuk ke dalam keretanya ada seorang lagi dalam kereta itu iaitu Hussin? Jawapan: Tak Setuju'.

SP6 mengesahkan keterangan SP5. Dalam pemeriksaan utama mengatakan 'Saya lihat kereta hitam ini berhenti di tempat letak kereta di depan tanah perkuburan Islam Batu 3 Jalan Ipoh. Seorang lelaki lari lintas jalan masuk ke tanah perkuburan. Lelaki ini keluar dan kenderaan warna hitam tersebut WQQ 5232. 'Q: Ada orang lain bersamanya pada masa itu? J: Tidak'. Dalam pemeriksaan balas beliau mengatakan 'S: Saya katakan Tertuduh dan seorang lagi Hussin telah keluar dari kereta itu ke tempat letak kereta dekat stesen minyak Petronas dan lari ke tempat perkuburan? J: Tak Setuju'.

Tak dapat dinafikan dalam pemeriksaan balas, Tertuduh SD1 menafikan tiada orang dalam kereta yang dipandunya itu. Beliau menegaskan Hussin ada dalam kereta itu. Hussin yang mencampakkan dadah itu semasa dikejar oleh polis.

Daripada keterangan SP5 dan SP6 dibandingkan dengan keterangan SD1 (Tertuduh) dan SD2, Mahkamah berpendapat keterangan SP5 dan SP6 adalah lebih logik dan lebih boleh diterima. Dari segi 'conduct' Tertuduh mencampakkan

dadah berbahaya itu keluar dari kenderaan WQQ 5232 menunjukkan Tertuduh memiliki, mempunyai pengetahuan dan mengedarkan dadah berbahaya tersebut. Keputusan kes-kes Mahkamah Persekutuan *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 dan *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113 adalah sangat relevan dengan kes ini. Mahkamah berpendapat bahawa pembelaan adalah tidak boleh dipercayai. Keterangannya adalah 'afterthought' dan penafian semata-mata (*Public Prosecutor v Sam Kim Kai* [1960] 1 MLJ 265, *Mat v Public Prosecutor* [1963] 1 MLJ 263, *Public Prosecutor v Saimin* [1971] 2 MLJ 16 dan *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195).

Mahkamah berpendapat pembelaan gagal menimbulkan keraguan yang munasabah ke atas kes prima facie pendakwaan.

Mengenai isu kedua, mahkamah juga berpandangan bahawa tertuduh gagal mematahkan anggapan di bawah s 37(da) Akta Dadah Berbahaya 1952.

Melihat kepada demeanor tertuduh semasa memberi keterangan membela diri, mahkamah berpendapat tertuduh tidak bercakap benar.

Selepas meneliti kes pendakwaan dan pembelaan keseluruhannya secara maksima, mahkamah berpuashati bahawa pendakwaan berjaya membuktikan kesnya melampaui keraguan yang munasabah seperti yang diperuntukkan oleh s 182A(1) Kanun Tatacara Jenayah. Oleh itu mahkamah mendapati tertuduh bersalah dan mahkamah menyabitkannya ke atas pertuduhan yang dikenakan seperti yang diperuntukkan oleh s 182A(2) kanun yang sama.

[47] Hence, it was trite that an appellate court should not disturb with the finding of facts made by the learned judge unless it can be shown that he had seriously misdirected himself or that his decision was not reasonable in the circumstances of the case. We failed to see that such challenges had been successfully raised in this case. We therefore agreed with the findings made by the learned judge and saw no merit in learned counsel's argument on this issue.

[48] In the upshot, we were unanimous in our view that the conviction of the appellant was safe. We therefore dismissed the appeal and affirmed the conviction and sentence by the learned High Court judge.

Appeal dismissed.

Reported by Ashok Kumar